Supreme Court, U.S.
FILED

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# In The Supreme Court of the United States

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**JEFFREY A. CRAWFORD,**

*Petitioner,*

**v.**

**K. J. BASSETT, WARDEN,**

*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Fourth Circuit decided an important federal question in a manner that conflicts with relevant decisions of this Court when the Court of Appeals denied appellant's petition for a Certificate of Appealability. Rule 10(c).

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IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. CRAWFORD

Petitioner

versus

K. J. BASSETT, Warden

Respondent

# PETITION FOR WRIT OF CERTIORARI

## Corporate Disclosure Statement

There are no corporate entities who are parties in this case.

## Orders Entered in the Case

Unpublished order of dismissal in the United States Fourth Circuit Court of Appeals, *Jeffrey A. Crawford v. K. J. Bassett,* Case No. 04-7963 entered May 5, 2005.

United States District Court, Eastern District, No. 1:03cv1506 entered November 16, 2004.

## Jurisdiction

A final order of dismissal in the above-captioned case was entered in the United States Fourth Circuit Court of Appeals on May 5, 2005. Appellate jurisdiction in this Court is based upon 28 U.S.C. § 1254 which provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the

Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

See *Hohn v. U.S.*, 524 U.S. 236, 118 S.Ct. 1969, 1978 (1998)(Supreme Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals).

## Statutory Provisions Relevant to this Case

28 U.S.C. § 2253(c)

"(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken of appeals from-

"(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

* * * * * * * * * * * * *

"(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

## Statement of the Case

Petitioner is a Virginia prisoner currently housed in the Keen Mountain Correctional Center, Keen Mountain, Virginia. He was convicted in the Circuit Court of Gloucester County, Virginia of armed statutory burglary, robbery, abduction and rape. On June 30, 1998 petitioner was sentenced to serve two life sentences for armed statutory burglary and rape, forty years for abduction, and twenty years for robbery.

Petitioner thereafter filed a succession of appeals and a petition for habeas corpus in the Virginia state courts alleging, inter alia, ineffective assistance of counsel in his trial proceedings. Petitioner's appeals were dismissed and habeas relief was denied on the merits by the Virginia Supreme Court on August 14, 2003.

On November 24, 2003 petitioner filed a *pro se* petition for writ of habeas corpus in the United States District Court, Eastern District of Virginia, Alexandria Division. Jurisdiction lay in the district court pursuant to 28 U.S.C. § 2254.

The respondent objected that the federal habeas petition was not timely filed. Accordingly, the district court entertained briefs on the timeliness question and on April 26, 2004 entered an order granting petitioner the benefit of equitable tolling of the time limit of 28 U.S.C. § 2244(d) and allowed the habeas petition to proceed (Civil Action No. 03-1506-AM). Respondent thereafter filed a motion to dismiss arguing, inter alia, that petitioner's late filing was the result of a "quarterly" lockdown which petitioner should have anticipated and allowed for in his preparation for filing his petition for writ of habeas corpus. Petitioner filed responsive pleadings, but on November 16, 2004 the district court vacated the order of April 26, 2004 and ruled that petitioner's habeas petition was time barred, having been filed ten days after the § 2244(d) time limit had expired. The district court did not rule on the merits of the habeas petitions. The district court further declined to grant a certificate of appealability.

Petitioner thereafter filed an appeal in the United States Court of Appeals for the Fourth Circuit requesting that the appeals court reverse the district's court final decision regarding equitable tolling of the statute of limitations, that

the case be remanded to the district court for further proceed[illegible] on petitioner's habeas petition, and that the court of appe[illegible]ssue a certificate of appealability in the case. By per curiam opinion of May 5, 2005 the court of appeals denied petitioner's request for a certificate of appealability and dismissed his appeal.

Argument

The three-judge panel per curiam opinion of the court of appeals cited cases including *Slack v. McDaniel,* 529 U.S. 484, 120 S.Ct. 1595 (2000) regarding the standard that petitioner must meet in support of the issuance of a certificate of appealability by the appeals court (Appendix, pages A1 - A2):

> 28 U.S.C. § 2253(c)
> "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
> "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
> * * * * * * * * * * * * *
> "(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The court opined that "Crawford has not made the requisite showing." but offered no analysis to show that *Crawford* was not entitled to the rule of *Slack v. McDaniel* and gave no hint as to the particulars of the deficiencies that the court may have noted in petitioner's preliminary informal brief as filed in that court.

Petitioner was mindful of the requirements of 28 U.S.C. § 2253(c)(1) and (c)(2) which imposes a two-pronged standard that petitioner must meet in order to qualify for relief in the court of appeals: 1) that petitioner must show clear error in the decision of the district court below and 2) that the petitioner must make a substantial showing of the denial of a constitutional right.

1. Error in the District Court

Under the heading of Issues on Appeal in Petitioner's Preliminary Informal Brief in the court of appeals petitioner clearly argued and gave exhibits and evidence in support of the argument that petitioner was prevented from timely filing his federal habeas petition by 1) an *unanticipated* institutional lockdown at Keen Mountain, and 2) the fact that petitioner was illiterate to the extent that he was not able to read cases and other materials without assistance and could not complete his petition without the assistance of other inmates, which assistance was not available at all during the institutional lockdown (Appendix, pages A5-A8). Petitioner's exhibits as presented to the court of appeals included a memorandum from Warden Barrett which advised the inmate population of "Emergency Security Lockdown" commencing on November 10, 2003. This lockdown ended on November 23, 2004 and was therefore in effect on the last day of the filing period under § 2244(d), November 14, 2003. Petitioner was finally able to complete and file his habeas petition on November 24, 2003, the first day after the end of the lockdown. The petitioner's circumstances clearly fell within the rationale of *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Circ.2000) which provides that equitable tolling of a limitation period may be granted in the event that petitioner is prevented from filing due to extraordinary circumstances

beyond petitioner's control and external to his own conduct. Petitioner was indeed diligent in seeking emergency assistance (which assistance was not provided) during the lockdown and in filing his petition at the earliest possible moment following the end of the lockdown. In fact, petitioner was informed in writing by an inmate counselor during the lockdown that he would be able to complete the filing of his habeas petition *after* the lockdown had been lifted. The foregoing information was fully briefed and documented for the 4th Circuit Court of Appeals.

2. Denial of a Constitutional Right

Petitioner's state and federal habeas petitions included essentially the same 6th Amendment claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).[1] Petitioner's Claim A claimed ineffective assistance of counsel by reason of counsel's failure to investigate or offer an alibi defense at trial. This ineffective assistance claim had been rejected by the Virginia Supreme Court in state habeas proceedings because petitioner's trial counsel filed an affidavit incident to state habeas proceedings claiming that "...petitioner told counsel that petitioner was in the victim's bedroom and that the victim performed consensual, oral sex on him."[2]

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[1]The district court's memorandum opinion of November 16, 2004 recited petitioner's habeas Claims A. through H. but made no findings on the merits of those claims.

[2]The quoted language appears in the Virginia Supreme Court order of Aug. 14, 2003 dismissing petitioner's claims on the merits. *Crawford v. Dir. of Dept. Of Corr.*, R. No. 022647. Trial counsel offered, and the Va. Sup. Ct. accepted, the same rationale

Petitioner's trial counsel concluded that petitioner's reliance upon alibi witnesses was in bad faith and that it would be unnecessary to investigate petitioner's alibi witnesses. It was argued in petitioner's Preliminary Informal Brief in the 4th Circuit Court of Appeals that counsel's affidavit was inherently incredible given that the victim had testified in detail at preliminary hearing and at trial (both hearings with the benefit of a court reporter) regarding the violent rape and robbery that had allegedly occurred in her home but had said nothing about oral sex, consensual or otherwise. The victim did not see the face of her assailant and did not identify petitioner at trial (Appendix, page A9-A10 ). It is therefore incomprehensible that trial counsel did not challenge and discredit this notion of consensual oral sex or that counsel did not seek the benefit of a mental health evaluation of a client who would contrive such a preposterous scenario.

Trial counsel's decision to not investigate petitioner's alibi witnesses is now very much open to question given that one Yvonne Harnetha Cooke has been located and has provided an affidavit to petitioner's current counsel regarding her knowledge of petitioner's whereabouts at the time of the alleged offense on November 18, 1995.(Appendix, pages A14-A15)[3] Petitioner's 6th Amendment claim of ineffective assistance due to counsel's unreasonable failure to investigate alibi witnesses in this case therefore constitutes a 6th

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as a reason for counsel's failure to investigate one Thomas Brown, another prime suspect in the case.

[3]The time allowed for filing the instant petition enabled present counsel to locate an alibi witness, Yvonne Harnetha Cooke, whose name had been given to trial counsel and whom petitioner had fully expected to be called as a witness at trial.

Amendment violation at least as grievous as counsels' deficiencies in *Williams v. Taylor*, 529 U.S. 391, 120 S.Ct. 1495 (2000)(failure to investigate and present mitigation evidence at sentencing) and *Wiggins v. Smith*, 539 U.S._____, 123 S.Ct. 2527(2003)(failure to investigate and present mitigation evidence at sentencing).

3. The Rule of *Slack v. McDaniel*

The posture of petitioner's case in this Court is foursquare within the holding of *Slack:*

> "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," *Slack,* 120 S.Ct. 1604.

The particular standard in this Court for a substantial showing of the denial of a constitutional right is given in *Barefoot v. Estelle*, 463 U.S. 891, 103 S.Ct. 3383 (1983). The petitioner must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. *Barefoot*, 103 S.Ct. 3395, n.4, citing *Gordon v. Willis*, 516 F.Supp. 911 (ND Ga. 1980).*Gordon* held that "Even a 'weak' argument...is properly certified under § 2253, whereas a 'frivolous argument'–one for which no rational argument can be made–is not subject to § 2253 certification." *Gordon* at

912, citation omitted. *Gordon* further opined that in the case of a petitioner proceeding *pro se*, as was the case with Crawford in the district court,

> "...the Court does not expect to see arguments formulated in such a way that they belong 'within the frontier of rationality', but rather must decide whether an attorney, whose craft it is to mold the facts and law into a rational thesis, could succeed in making an argument which is neither frivolous, nor so weak as to border on mere palaver," citation omitted. *Gordon* at 913.

Accordingly, petitioner respectfully argues to this Court that in this case where the district court initially granted, and then denied, the habeas petition on procedural grounds, petitioner's counsel presented sufficient argument and evidence to the court of appeals on the question of equitable tolling of the § 2244 limitation period such that "...jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 120 S.Ct. 1604.

> To establish ineffectiveness of counsel under *Strickland*, A 'defendant must show that counsel's representation fell below an objective standard of reasonableness." Citation omitted. "To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," citation omitted. *Williams v. Taylor*, 120 S.Ct. 1511.

Petitioner argued to the 4th Circuit that trial counsel's

failure to investigate alibi witnesses and to investigate the existence of another prime suspect for a reason that was implausible on its face fell below an objective standard of reasonableness as that standard is articulated in *Strickland, Williams, and Wiggins*, supra (Appendix, pages A10-A11). Accordingly, petitioner urges this Court to agree that petitioner presented more in the court of appeals than the bare legal minimums in support of petitioner's request for a certificate of appealability.

## Relief Requested

For the reasons aforestated petitioner requests that this Court:

1. Grant petitioner a Writ of Certiorari, and

2. Pursuant to the authority of Rule 16 of The Supreme Court that this Court issue a summary order remanding this case to the district court for proceedings on the merits of the petitioner's petition for writ of habeas corpus. See *Smith v. Digmon*, 434 U.S. 332, 98 S.Ct. 597 (1978)(per curiam opinion remanding case to district court for proceedings on the merits of petition for writ of habeas corpus).

Respectfully submitted,

JEFFREY A. CRAWFORD
By Counsel

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No. _____

# In The
# Supreme Court of the United States

**JEFFREY A. CRAWFORD,**

*Petitioner,*

**v.**

**K. J. BASSETT, WARDEN,**

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## APPENDIX

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**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 04-7963

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JEFFREY A. CRAWFORD,

Petitioner – Appellant,

Versus

K. J. BASSETT, Warden,

Respondent – Appellee.

---

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (CA-03-1506-1)

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Before WILLIAMS, KING, and DUNCAN, Circuit Judges.

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Dismissed by unpublished per curiam opinion.

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Jerry C. Lyell, LAW OFFICE OF JERRY C. LYELL, Arlington, Virginia, for Appellant. Leah Ann Darron, Assistant Attorney General, Richmond, Virginia, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Jeffrey A. Crawford, a state prisoner, seeks to appeal the district court's order dismissing as untimely his petition filed under 28 U.S.C. § 2254 (2000). This order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253 (c) (1). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c) (2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. See Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683 (4th Cir. 2001). We have independently reviewed the record and conclude that Crawford has not made the requisite showing. Accordingly, we deny Crawford's motion for certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal

contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JEFFREY ANDREW CRAWFORD

Petitioner,

vs.Case No. 04-7963

K. J. BASSETT, WARDEN,

Respondent.

PETITIONER'S PRELIMINARY INFORMAL BRIEF

Petitioner presents the following information pursuant to this Court's order of December 15, 2004:

1. Petitioner is appealing the order of November 16, 2004 from the United States District court for the Eastern District of Virginia, Alexandria, Virginia, wherein that court vacated its earlier order granting equitable tolling of the limitation within which petitioner could file a petition for writ of habeas corpus in that court.

2. Petitioner presented his Notice of Appeal in this case to a prison officer on November 30, 2004.

3. The District Court did not grant a certificate of appealability.

ISSUES ON APPEAL

1. District Court Order Erred in Vacating Order of Equitable Tolling.

4. On November 16, 2004 the District Court entered an order (Dist. Ct. Record Doc. 26) vacating an earlier order (Dist. Ct. Record Doc. 11) wherein petitioner had been granted the relief of equitable tolling of the time limitation for filing a petition for writ of habeas corpus in the District Court. In its order of 11/16/04 the District Court noted that an institutional lockdown was in effect from 11/08/03 through 11/23/03 and opined that petitioner had anticipated this lockdown. The court further interpreted the prison counselor's response to petitioner's Emergency Grievance Form dated November 10, 2003 (Dist. Ct. Record Doc. 9, Exhibit F) as an advisory to petitioner that his grievance did not meet the definition of an emergency and that he could complete his petition when the institution came off lockdown. The court's analysis concluded that, at least in theory, petitioner had the means for timely completion of his petition for writ of habeas corpus.

5. The District Court erred on two fundamental points: 1) that petitioner was capable of drafting his own petition, and 2) that petitioner was able to obtain the necessary assistance during lockdown. Paragraphs 3, 4 and 5 of petitioner's affidavit, Exhibit A attached, are evidence in support of the fact that petitioner is illiterate to the extent that he cannot prepare his own pleadings. The record in this case is replete with additional evidence in support of the fact of petitioner's incapacity: Every pleading filed in this case on behalf of the petitioner was either typed or hand-written by others. And petitioner's request for library privileges were not for himself, they were for the benefit of other inmates

who were doing the actual work. The pleadings bear petitioner's signature—all else is the work product of others. However, Exhibit F, referenced in Paragraph 4 above does bear an example of the petitioner's hand writing. This Court is urged to examine this document as evidence of petitioner's limited ability to read and write. Petitioner was unable even to count the days remaining before the filing deadline: He incorrectly calculated the deadline as November 18 rather than November 14, 2003, the actual filing deadline.

6. The record in this case includes a sealed document, a Presentence Investigation Report dated 6/22/98. On page 6 of this report under the heading Education is the probation officer's review of school records which revealed that petitioner had barely completed the eight grade in school. Petitioner has no military experience and what can be ascertained in general from this report is that petitioner has no experience that would equip him to even minimally engage in the legal intricacies of appeals and habeas proceedings.

7. Paragraphs 6, 7 and 8 of petitioner's affidavit are further evidence of the fact that the prison lockdown from 11/08/03 through 11/23/03 was an unanticipated, emergency lockdown and that petitioner was left without the assistance that was necessary to the preparation of his petition during this period. Affidavits and exhibits presented by respondent have been interpreted to mean that this particular lockdown was a "quarterly lockdown" and that petitioner anticipated it as evidenced by his motions to the District court for an enlargement of time for filing his petition for writ of habeas corpus. But petitioner has found a copy of a memorandum from the prison warden dated November 10, 2003 which describes the condition of the prison facility on that date as

an "Emergency Security Lockdown" (copy of memo attached as petitioner's Exhibit B). This lockdown was not the quarterly lockdown contemplated by petition's motions for enlargement of time. This lockdown was an emergency response to perceived security problems at the prison. No inmate contact was allowed during this lockdown. In particular, no contact between petitioner and inmate Kevin A. Watson was allowed. Inmate Watson was the individual who had assisted petitioner in preparing his petition prior to the lockdown and who did, in fact, complete the petition on the first day following the end of the lockdown.

8. From the foregoing information it can be concluded that petitioner's filing was delayed by factors entirely beyond his control. It availed petitioner nothing to have legal authorities that he could not read brought from the library or to have copies of anything made during this lockdown. Petitioner's illiteracy was a major impediment to his progress during the lockdown, but illiteracy does not translate into a legal disability such as would justify his loss of legal rights on account of circumstances beyond his control. The terse response of petitioner's counselor on petitioner's Emergency Grievance Form of 11/10/03 illustrates the point that petitioner was getting no help from prison personnel. The counselor's comment that petitioner could complete his petition following the lockdown suggests that the counselor did not understand the significance of a federal filing deadline. And the counselor offered no other assistance to petitioner. It is apparent that neither the counselor nor anyone other than inmate Watson could have provided meaningful assistance to petitioner during the lockdown.

9. The circumstances described above clearly fall within the

contemplation of the principal that equitable tolling of the limitation period of 28 U.S.C. § 2244(d) is appropriate in "those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). The simple and indisputable facts are as follows: Petitioner is incapable of preparing something as challenging as a federal habeas petition without assistance, petitioner was deprived of an essential resource (assistance) by circumstances entirely unforeseen and beyond his control, and petitioner exercised due diligence in seeking assistance during the lockdown and in the immediate filing of his petition on the day after the lockdown ended.

10. This Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error. *Waters v. Gaston Count, N.C.* 57 F.4d 422, 425 (4th Cir. 1995). The District Court in this case clearly erred in determining that petitioner could have proceeded on his own during the emergency lockdown. Petitioner did proceed in rendering such assistance as he was capable of until the commencement of the emergency lockdown. And there is no evidence in the record to suggest that petitioner by any act of commission or omission contributed to the delay in the filing of his petition for writ of habeas corpus. Accordingly, petitioner respectfully requests that this Court find that petitioner is entitle to equitable tolling of the limitation period under 28 U.S.C. § 2244(d) and to find that petitioner's petition for writ of habeas corpus was timely filed. Petitioner further requests that this Court remand this case to the District Court for further proceedings on his petition.

SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT PURSUANT TO 28 U.S.C. § 2253(c)(2)

11. Petitioner hereby adopts and incorporates into this brief the arguments and authorities contained in petitioner's Petition for Writ of Habeas Corpus (Record Doc. 1), petitioner's Memorandum in support of motion for reconsideration of extension of time (Record Doc. 4) and petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus (Record Doc. 7).

12. Petitioner's petition for writ of habeas corpus sets forth claims A. through H. based on claims of ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Claim A. alleges ineffective assistance of counsel by reason of counsel's failure to investigate alibi witnesses. Claim F. alleges ineffective assistance of counsel by reason of counsel's failure to investigate another prime suspect in the case.

13. The Supreme Court of Virginia reviewed petitioner's state petition for writ of habeas corpus and dismissed same by order of 08/14/03. In dismissing Claims A. and F. the state court opined that counsel was not ineffective under *Strickland* because an affidavit from trial counsel stated that "...petitioner told counsel that petitioner was in the victim's bedroom and that the victim performed consensual, oral sex on him." This statement is inherently incredible given that the victim testified at trial in great detail concerning the rape and robbery that occurred in her home in the nighttime but said nothing to indicate that oral sex, consensual or otherwise, had taken place (Portion of trial

transcript of 02/24/98, 10 pages, attached as petitioner's Exhibit C). The victim gave the same account of events at preliminary hearing in December, 1997. Trial counsel was, of course, aware of this evidence before trial. It is therefore incomprehensible that trial counsel did not challenge and discredit this notion of consensual oral sex or that counsel did not seek to have a mental health evaluation of a client who would contrive such a preposterous scenario.

14. Upon reporting the crime to the police, the victim was taken to a local medical facility where a PERK (Physical Evidence Recovery Kit) Procedure was performed. Various items of clothing and personal effects were collected during this procedure (See Certificate of [DNA] Analysis of August 29, 1996 attached as petitioner's Exhibit D). PERKs include checklists for samples that are to be collected in sexual assault cases (including oral swabs and rinses if the victim reveals that oral sodomy has occurred). The victim obviously told the examiner nothing that was inconsistent with here later testimony at preliminary hearing and trial. Indeed, on the established facts of this case it is inherently incredible to suppose that this victim would have concealed an act of oral sodomy.

15. Petitioner's Claim F. regarding ineffective assistance of counsel for not investigating another prime suspect, one Thomas Brown, was dismissed for the same reason. Brown had been identified as a suspect (but not a co-defendant) by police Investigator Koehl (See Attachment A. to request for search warrant, 4 pages, attached as petitioner's Exhibit E). The Investigator's statement of material facts comprise a plausible basis for obtaining a blood sample and for investigating Brown. But trial counsel's reliance upon the

consensual sodomy story is not a plausible reason for not investigating Brown as a prime suspsect.

16. Trial counsel's failure to investigate alibi witnesses and the existence of another prime suspect in this case falls "...below an objective standard of reasonableness." See *Wiggins v. Smith*, 539 U.S. _____, 123 S.Ct. 2527, 2535 (June 26, 2003), construing *Strickland v.* Washington as the objective standard for minimum performance of counsel and articulating the principal that 'counsel has a duty to make reasonable investigations.' *Wiggins* at 2535. In this case trial counsel declined to conduct reasonable investigations for a reason that was implausible on its face.

17. Likewise, the Supreme Court of Virginia, in adopting the reasons given by trial counsel, rendered a decision that "...involved an unreasonable application of clearly established Federal law..." *Wiggins* at 2534. "It is past question that the rule set forth in *Strickland* qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States.' *Williams v. Taylor*, 529 U.S. 391, 120 S.Ct. 1495, 1512 (2000). And "...the *Strickland* test 'of necessity requires a case-by-case examination of the evidence.'" (citation omitted). *Williams* at 1512. The Virginia court disposed of petitioner's claims without evidentiary hearings and, therefore, without conducting a meaningful examination of the evidence. The Virginia court opined that trial counsel's performance was not deficient under *Strickland* based upon the court's uncritical acceptance of trial counsel's affidavit. Petitioner has therefore been denied his 6th Amendment right to effective assistance of counsel.

## RELIEF REQUESTED

It is respectfully requested as follows:

1. That this Court find that petitioner is entitled to the benefit of equitable tolling of the limitation period set out in 28 U.S.C. § 2244(d) and to find that petitioner's petition for writ of habeas as presented to prison officials on November 24, 2003 was timely filed.

2. That this Court remand this matter to the District Court for further proceedings on petitioner's petition for writ of habeas corpus.

3. That this Court issue a Certificate of Appealability in this case.

No other appeals have been filed by petitioner in this Court.

Respectfully submitted,

JEFFREY ANDREW CRAWFORD
By Counsel

/S/
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Counsel for Petitioner
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Tel. (703) 243-3133

## CERTIFICATE

I hereby certify that a true copy of Petitioner's Preliminary Informal Brief was mailed to Leah Ann Darron, Office of the Attorney General of Virginia, 900 East Main Street, Richmond, Virginia 23219 on the 24th day of January, 2005.

/S/
Counsel for Petitioner

## AFFIDAVIT OF YVONNE HARNETHA COOKE

COMMONWEALTH OF VIRGINIA, at large:
CITY/COUNTY OF YORK

Personally appeared before me, the undersigned notary public, YVONNE HARNETHA COOKE, who first being duly sworn, deposed and stated as follows:

1. That she is Yvonne Harnetha Cooke, presently residing inWilliamsburg, Virginia.

2. That in 1995 she resided in the home of her father, Joe Cooke, in the town of Gloucester, Virginia.

3. That she is personally acquainted with Jeffrey Crawford, an individual who was accused, tried and convicted of the offense of forcible rape alleged to have been committed on one Coleen Caton during the predawn hours of November 18, 1995 in Gloucester, Virginia.

4. That the affiant and Jeffrey Crawford were engaged in an intimate relationship in 1995 and that Jeffrey Crawford was together with the affiant in her father's home on many nights in 1995, especially during the month of November.

5. That to the best of affiant's knowledge and ability to recall, Jeffrey Crawford was with her on the night of November 17, 1995 including the morning hours of November 18, 1995.

6. That no one contacted the affiant on behalf of Jeffrey Crawford with regard to the alleged offense for which he went to trial in the Circuit Court of Gloucester, Virginia.

Further the affiant sayeth not.

_____/S/_____
YVONNE HARNETHA COOKE

SWORN TO and SUBSCRIBED before me by
YVONNE HARNETHA COOKE this 26th day of July, 2005.

_____/S/_____
Notary Public
My commission expires: 10/31/05

The original affidavit bears the signature and impressed seal of Susan K. Clements

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JEFFREY ANDREW CRAWFORD,

Petitioner,

v.

K. J. BASSETT, WARDEN,

Respondent.

Action No. 1:03cv1506

ORDER

For the reasons stated in the accompanying Memorandum Opinon, it is hereby

ORDERED that the Court's Order dated April 26, 2004 granting equitable tolling (Doc. No. 11) is VACATED; and it is further

ORDERED that the respondent's Motion to Dismiss (Doc. No. 14) is GRANTED; and it is further

ORDERED that this Petition for a Writ of Habeas Corpus is DISMISSED as barred by the statute of limitations.

Should petitioner wish to appeal, written notice of appeal must be filed with the Clerk of this Court within thirty (30) days of the date of this Order. Petitioner also must request a certificate of appealability from a circuit justice or

judge. See 28 U.S.C. § 2253; Fed. R. App. P. 22(b). This Court expressly declines to grant such certificate for the reasons in the accompanying Memorandum Opinion.

The Clerk is DIRECTED to send a copy of the Order and the accompanying Memorandum Opinion to petition and to counsel of record for the respondent.

Dated: 11/16/04
Alexandria, Virginia

/s/
Leonie M. Brinkema
US District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JEFFREY ANDREW CRAWFORD,
Petitioner,
v.

K. J. BASSETT, WARDEN,
Respondent.

Action No. 1:03cv1506

MEMORANDUM OPINION

Petitioner, Jeffrey Andrew Crawford ("Crawford"), a Virginia inmate proceeding pro se, filed this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging the validity of his convictions in the Circuit Court of Gloucester County, Virginia. By Order dated April 26, 2004, we found that Crawford's time-barred petition was salvaged by equitable tolling and allowed this action to proceed. On June 30, 2004, respondent filed a Motion to Dismiss and Rule 5 Answer. Crawford was given the opportunity to file responsive materials, pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), and has filed a response. Accordingly, this matter is now ripe for disposition. For the reasons that follow, our April 26, 2004 Order granting equitable tolling must be vacated, and Crawford's petition must be dismissed as barred by the applicable statute of limitations.

## I. Background

Crawford was convicted in the Circuit Court of Gloucester County of armed statutory burglary, robbery, abduction, and rape. On June 30, 1998, Crawford was sentenced to serve two life sentences for armed statutory burglary and rape, forty years in prison for abduction, and twenty years in prison for robbery.

Crawford filed a direct appeal in the Court of Appeals of Virginia, which was dismissed because he failed to timely file a transcript or statement of facts. Crawford v. Commonwealth, R.No. 1644-98-1 (Va. Ct. App. Oct. 8, 1998). Accordingly, Crawford filed a petition for a writ of habeas corpus in the Supreme Court of Virginia arguing that he had been denied his right of appeal. The Supreme Court of Virginia awarded Crawford a writ of habeas corpus limited to the issue of the denial of his right to appeal. Crawford v. Director, R. No. 982195 (Va. Feb. 25, 1999).

Crawford filed his belated appeal in the Court of Appeals of Virginia, arguing that the jury instruction on DNA was improper because it unduly emphasized the DNA evidence, contained permissive language, and required the jury to make a distinction they were unqualified to make. In September 19, 2000, a divided panel of the Court of Appeals of Virginia reversed Crawford's conviction, finding that the trial court abused its discretion when it instructed the jury "that DNA testing is deemed to be a reliable scientific technique under the laws of Virginia when admitted to prove the person's identity." Crawford v. Commonwealth, 534 S.E.2d 332, 333 (Va. Ct. App. 2000). Upon rehearing en banc, a divided Court of Appeals vacated the panel's decision and affirmed the trial court's judgment on the ground that Crawford did not object to the jury instruction at trial. Crawford v. Commonwealth, 546 S.E.2d 207, 207 (Va. Ct. App. 2001).

Crawford appealed to the Supreme Court of Virginia, where his petition for appeal was refused on September 14, 2001. Crawford v. Commonwealth, R. No. 011320 (Va. Sept. 14, 2001). Next, Crawford filed a petition for rehearing, which the Supreme Court of Virginia denied on November 2, 2001. Crawford v. Commonwealth, R. No. 011320 (Va. Nov. 2, 2001). Accordingly, Crawford's conviction became final on January 31, 2002, the last date he could have petitioned the Supreme Court of the United States for a writ of certiorari.[1]

On October 31, 2002, Crawford filed a state habeas petition in the Supreme Court of Virginia, arguing that trial counsel was ineffective for failing to:

(A) investigate or offer an alibi defense;
(B) make an adequate investigation of facts to present at the suppression hearing;
(C) object to the taking and use of the accused's blood sample for analysis or to the admissibility of the Commonwealth's certificate of analysis, even though no proper foundation was laid;
(D) object to the Commonwealth's certificate of analysis, even though a pretrial motion to suppress was made and a hearing was conducted, resulting in this issue not being preserved for consideration on appeal;

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[1]See U.S. Sup. Ct. R. 13(1) (petitions for review are timely filed within 90 days of the entry of judgment by a state court of last resort).

(E) (i) seek an independent analysis of the specimen from the alleged perpetrator, which was still available after the accused was in custody, or (ii) object to the use of the Commonwealth's evidence of analysis once it was discovered that the specimens had been disposed of prior to trial;

(F) investigate or request a summons for the appearance of the other prime suspect in the case, Thomas Brown, who fit the victim's physical description of the alleged perpetrator when the accused did not;

(G) engage or summons an expert witness to impeach or rebut the "indefinite statistical identification of the accused with scientific evidence; and

(H) failed to offer an alternative jury instruction when he objected to the form of the jury instruction on DNA testing.

The Supreme Court of Virginia dismissed Crawford's petition on January 28, 2003, finding that it was not timely filed. Crawford v. Dir. Of the Dep't of Corr., R. No. 022647 (Va. Jan. 28, 2003). Next, Crawford filed a petition for rehearing, which was granted on February 28, 2003. Crawford v. Dir. Of the Dep't of Corr., R. No. 022647 (Va. Feb. 28, 2003). ON August 14, 2003, the Supreme Court of Virginia dismissed Crawford's petition on the merits. Crawford v. Dir. Of the Dep't of Corr., R. No. 022647 (Va. Aug. 14, 2003).

On November 24, 2003, Crawford filed the instant federal habeas corpus petition. In the instant petition, he raises claims (A) through (H), which are identical to the

claims he raised in his state habeas petition, and claim (I), which is the same claim he raised on direct appeal. On June 30, 2004, respondent filed a Motion to Dismiss and Rule 5 Answer, arguing that Crawford's petition is barred by the applicable statute of limitations. Crawford has filed a response. Therefore, the matter is now ripe for review.

## II. Statute of Limitations

A petition for a writ of habeas corpus must be dismissed if filed later than one year after: (1) the judgment becomes final; (2) and state created impediment to filing a petition is removed; (3) the United States Supreme Court recognizes the constitutional right asserted; or (4) the factual predicate of the claim could have been discovered with due diligence. 28 U.S.C. § 2244(d) (1) (A)-(D). A petitioner must demonstrate the petition was timely filed under § 2244(d) or that the circumstances are such that his untimely petition may be salvaged by equitable tolling principles. See Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) (applying equitable tolling principles to § 2244(d)).

Between January 31, 2002, the date Crawford's conviction became final, and October 31, 2002, the date Crawford filed his state habeas petition, 273 days passed. The limitations period when tolled between October 31, 2002, and August 14, 2003, the time during which Crawford's state collateral proceedings were pending. Then, between August 14, 2003 and November 24, 2003, the date Crawford's instant petition was filed, 102 days passed. The two periods combined total 375 days, or more than one year. Thus, absent equitable tolling, Crawford's petition is barred by the statute of limitations. 28 U.S.C. § 244(d)

## III. Equitable Tolling

By Order dated April 26, 2004, we found that Crawford's untimely petition could be salvaged by equitable tolling. We found that equitable tolling was warranted in the instant action due to a combination of factors. Our primary concern was that Crawford filed two motions in the Court requesting an enlargement of time to filed his federal habeas petition. These motions were not sent to a judge; instead, the Clerk informed Crawford that the Court could not rule on free standing motions. We found that it was unclear whether Crawford's motions should have been construed liberally as a timely petition for writ of habeas corpus. Additionally, we considered the fact that Crawford was subject to institutional lockdown on the days leading to the expiration of the limitations period and that he filed his petition on the day that the prison lockdown ended. He later submitted a more detailed supporting memorandum for which he had been seeking an enlargement of time to prepare.

In his motion to Dismiss, respondent argues that the equitable tolling should not apply in this case and urges us to reconsider our decision that Crawford's petition is timely pursuant to 28 U.S.C. § 2244(d). Equitable tolling of the statute of limitations provided in 28 U.S.C. § 2244(d) is "reserved for those rare instances where - due to circumstances external to the party's own conduct - it would be unconscionable to enforce the limitation period against the party and gross injustice would result." Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cor. 2000). The Fourth Circuit has held that "to be entitled to equitable tolling, an otherwise time-barred petitioner must present (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from

filing on time." United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (quoting Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003)). In order to demonstrate that equitable tolling is proper, "[t]he petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims." Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 618-19 (3d Cir. 1998) (citations and internal quotation marks omitted); see also Harris, 209 F.3d at 330. "[A]ny invocation of equity to relieve the strict application of a statute of limitations mus be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." Harris, 209 F.3d at 330.

In the instant petition, Crawford had until November 14, 2003 to timely file his federal habeas petition. As Crawford filed the instant petition on November 24, 2003, he exceeded the § 2244(d) limitations period by ten days. Crawford argues that his untimely petition should be salvaged by equitable tolling because he was unable to complete his federal habeas petition during prison lockdown due to his limited-access to the law library. Crawford admits that he anticipated the approaching lockdown, an accordingly, he filed a motion on October 9, 2003, requesting additional time in which to timely file his federal habeas petition. By letter dated October 155, 2003, the Clerk informed Crawford that the Court could not act on a motion until Crawford filed a petition with the Court. On October 19, 2003, Crawford filed a motion asking the Court to reconsider granting him an enlargement of time to file his federal habeas petition. By letter dated October 24, 2003, the Clerk again informed Crawford that the Court was unable to rule on freestanding motions and provided him with a form for filing a petition for writ of habeas corpus.

As Crawford had anticipated, an institutional lockdown occurred from November 8, 2003 to November 23,

2003, during which period the date for Crawford to timely file his federal habeas petition passed. On November 10, 2003, Crawford filed an emergency grievance form informing prison officials that he had an approaching deadline to timely file his federal habeas petition. That same day, Philip Ward ("Ward"), a Rehabilitative Counselor at Keen Mountain Correctional Center, responded that Crawford's grievance did not meet the definition of an emergency petition once the institution was off lockdown. By affidavit, Ward does not deny that Crawford did not have access to the law library during the lockdown. However, Ward attests that Crawford could have mailed a completed petition during lockdown, had copies of legal materials in the law library made for him, obtained a blank habeas petition form, or received assistance in completing his petition. In his grievance, Crawford did not specifically request any of these services.[2] Crawford filed the instant petition on the day that the prison lockdown ended and later submitted a more detailed supporting memorandum for which he had been seeking the enlargement of time to prepare.

Unpredictable prison lockdowns or law library closures do not constitute extraordinary circumstances warranting equitable tolling. Bilodeau v. Angelone, 39 F. Supp. 2d 652, 659 n.1 (E.D. Va. 1999) (citations omitted). In the instant action, there was nothing extraordinary about

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[2]Crawford contests Ward's assertion in his affidavit that he was available to Crawford during lockdown and that he provided Crawford with copies. However, Crawford does not dispute Ward's statements that during the lockdown mail procedures remained the same as normal procedures and that Crawford could have mailed a completed federal habeas petition despite the prison being under lockdown.

the nature of the prison lockdown that would warrant equitable tolling, particularly where Crawford had eighty-six days from the dismissal of his state habeas petition until the lockdown began within which to timely file his federal habeas petition. Importantly, Crawford anticipated the lockdown and in the instant petition, raises identical claims to those he raised on direct appeal to the Supreme Court of Virginia and in his state habeas petition. Accordingly, Crawford had ample time to prepare his federal habeas petition.

We also find that Crawford's two motion for enlargement of time do not warrant equitable tolling. In response to Crawford's motions, the Clerk provided Crawford with a copy of a federal habeas for and advised him that a free standing motion for extension of time could not be granted without first filing an action in this Court. At the time Crawford filed his motions for enlargement of time, he had more than one month to timely file his federal habeas petition. Accordingly, the Clerk properly informed Crawford that he was required to first file a petition and provided him with the forms to file such a petition. Crawford does not demonstrate that the Court's response to his motions prevented him from timely filing the instant petition.

In sum, Crawford (1) anticipated the prison lockdown; (2) had eighty-six days prior to the lockdown within which to timely file his petition; (3) raised claims in the instant petition that are identical to those he raised in state court; and (4) received a form for filing a habeas petition from the Clerk of this Court before the lockdown began, Further Crawford was not prevented from mailing a completed petition during the prison lockdown. Accordingly, we find that Crawford was not prevented by extraordinary circumstances beyond his control or external to his own conduct from timely filing the instant petition and ha has not demonstrated that he was diligent in filing the instant

petition. Thus, Crawford is not entitled to equitable tolling and the Court's Order dated April 26, 2004, in which we granted Crawford equitable tolling and found the instant petition timely, will be vacated and this petition dismissed as barred by the statute of limitation.

## IV. Conclusion

For the reasons stated above, respondent's Motion to Dismiss must be granted, and Crawford's petition dismissed as barred by the statute of limitations. An appropriated order shall issue.

Dated:
Alexandria, Virginia

/S/
Leonie M. Brinkema
UNITED STATES DISTRICT JUDGE